No. 22,356

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. VAN HOUTEN,

Appellant,

v.

RAY ARTHUR RALLS and GERALD L. BYINGTON,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

BRIEF FOR THE APPELLEES

FILED

AUG 12 1968

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S. Rept. No. 736, 87th Cong., 1st Sess. ------------

107 Cong. Rec. 18,499-18,500, 87th Cong., 1st Sess. -

2 Larson, Workmen's Compensation Law § 72.20, pp. 173-174 --

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JURISDICTIONAL STATEMENT

This action was instituted by the appellant, Van Houten, in
Seventh Judicial District Court of the State of Nevada,
nty of White Pine, to recover for injuries allegedly caused
the improper driving of appellees Ralls and Byington, govern-
t employees (R. 7-12). The action was thereafter removed to
United States District Court for the District of Nevada, pur-
nt to subsection (d), the Federal Drivers Act, 28 U.S.C.
9(d) (R. 2-5). The district court granted appellees' motion
dismiss on the ground that the Federal Drivers Act, 28 U.S.C.
9(b) - (e) protected them against liability arising out of

driving in the course of their government employment (R. 71-
The jurisdiction of this Court rests on 28 U.S.C. 1291.

STATEMENT OF THE CASE

On June 14, 1966, before instituting the present suit, a
pellant Van Houten brought an action against appellees Ralls a
Byington, and the United States, in the United States Distri
Court for the District of Nevada (Civil No. 1838) (R. 82-87)
In his complaint Van Houten alleged that he was injured on D
ber 1, 1964, while riding as a passenger in Byington's car,
a time when both he and Byington were on government business
The accident allegedly occurred when Byington's car collided
with a vehicle being driven by Ralls, who was also in the cou
of his government employment, and because of the negligence
Ralls, Byington, or both. Van Houten sought damages of
$295,320.27 from the United States (under the Federal Tort Ca
Act, 28 U.S.C. 1346(b), 2671 _et seq._,) and from Ralls and Byn

On January 6, 1967, the district court granted the goven
ment's motion for summary judgment as to Van Houten's suit u
the Tort Claims Act, on the ground that his exclusive remedy
against the United States lay under the Federal Employees Com
sation Act, 5 U.S.C. 751 _et seq_. And the Court dismissed
Van Houten's action as to Ralls and Byington for lack of fed
jurisdiction (R. 123-133). Judgment was accordingly entered
January 10, 1967 (R. 134).

In the meantime, however, Van Houten, on November 29, 19
filed the present action against Ralls and Byington in the S

dicial District Court of the State of Nevada, County of White ne (No. 8957) (R. 7-11). In this action Van Houten asserted sentially the same factual allegations as to Ralls and Byington he had asserted in his action in the United States District urt, and again sought judgment for $295,320.27.

Thereafter, Ralls,[1] through the United States Attorney, titioned the United States District Court for the District of vada for removal of the action pursuant to subsection (d) of e Federal Drivers Act, 28 U.S.C. 2679(d) (R. 3-5). That peti- on asserted that Ralls and Byington were acting in the scope their government employment at the time of the accident, and at therefore pursuant to the Federal Drivers Act, Van Houten's medy lay against the United States under the Federal Tort aims Act, 28 U.S.C. 1346(b). In support of that petition, and rsuant to 28 U.S.C. 2679(d), the United States Attorney certi- ed that at the time of the accident Ralls was in the scope of s government employment.

After removal, Van Houten moved to remand the case to the ate Court for trial against Ralls and Byington, individually sertedly pursuant to 28 U.S.C. 2679(d) (R. 17-19). Ralls and ingtor through the United States Attorney cross-moved for a smissal of the action on the ground that the Drivers Act immun- ed them from all personal liability arising out of driving in e course of their government employment (R. 20-22).

' Apparently, Byington had not yet been served with process in e State Court action (R. 3).

On August 31, 1967, the district court accepted the Uni
States' position and held that Van Houten's action against R
and Byington should be dismissed (R. 71-75). The court rule
that to deprive Ralls and Byington of the protection of the
Drivers Act

> is to attribute to Congress an intent when it adopted the Government Drivers Act amendment to the Federal Tort Claims Act which affronts common sense. Under that interpretation, a federal employee driver of a motor vehicle in the course of his employment is normally exonerated from personal liability, but not so if the injured person is another federal employee who has a claim for compensation under the Federal Employees Compensation Act. An intent to engraft such an incongruous exception to the general immunity from personal liability cannot be found in the language of the statute nor in the legislative history.

Judgement dismissing the action was filed on September
1967 (R. 75). This appeal followed (R. 78).

STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et*
provides in pertinent part:

> 1346(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Federal Drivers Act, 28 U.S.C. 2679(b)-(e), provide
pertinent part:

Subsection (b), 28 U.S.C. 2679(b):[2/]

The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

Subsection (c), 28 U.S.C. 2679(c):

The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal Agency.

Subsection (d), 28 U.S.C. 2679(d):

Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit

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Subsection (b) was amended by P. L. 89-506, July 18, 1966, 80 at. 306, 307, to reflect _inter alia_ the new requirement that l Tort Claims be presented for administrative consideration ior to commencement of suit under the Tort Claims Act. See 28 S.C. (Supp. II) 2401(b), and 2672. The amended provision, 28 S.C. (Supp. II) 2679(b) which contains some other minor changes, plies to claims accruing six months or more after July 18, 1966, d is therefore inapplicable here.

arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

The Federal Employees' Compensation Act, 5 U.S.C. 751 et seq. (now 5 U.S.C. (Supp. II) 8101 et seq.) provides in pertinent part (Section 757(b)):[3/]

> The liability of the United States or any of its instrumentalities under sections 751-756, 757-781, 783-791 and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel.

3/ Title 5 of the United States Code has been recodified, a the F.E.C.A. is now found at 5 U.S.C. (Supp. II) 8101 et sq 5 U.S.C. 757(b), with minor modifications, is now found at 5 U.S.C. (Supp. II) 8116(c).

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE FEDERAL DRIVERS ACT BARS VAN HOUTEN'S SUIT AGAINST RALLS AND BYINGTON AS A MATTER OF LAW.

The Federal Drivers Act, 28 U.S.C. 2679(b)-(e), was enacted ı 1961 to relieve government drivers of the necessity of purıasing private insurance to cover their government driving, and ɔ protect all government drivers from the threat and burden of ıits and judgments resulting from driving for the government. ee H. Rept. No. 297, 87th Cong., 1st Sess.; S. Rept. No. 736, 7th Cong., 1st Sess.; 107 Cong. Rec. 18,499-18,500, 87th Cong., st Sess. The Federal Drivers Act accomplishes this by making the remedy against the United States provided by the tort claims rovisions of that title [28 U.S.C. 1346(b)] for damage to proerty, personal injury or death resulting from the operation of motor vehicle by an employee of the United States within the cope of his employment . . . exclusive of any other civil action r proceeding by reason of the same subject matter against the mployee involved or his estate." H. Rept. No. 297, _supra_, pp. -2. And the statute was plainly intended to "exclude _suits_ gainst employees in their individual capacities on the same laims." _Id_. at p. 4 (emphasis added).

In accordance with the Congressional purpose, 28 U.S.C. 679(b) provides in unambiguous language that "[t]he remedy by uit against the United States as provided by section 1346(b) of his title [Federal Tort Claims Act] for damage . . . or . . . njury . . . resulting from the operation by any employee of the

Government of any motor vehicle while acting within the scope o[f] his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee . . . whose act . . . gave rise to the claim." (Emphasis added.) Thus, the statute accomplishes the Congressional purpose of protecting individual drivers from personal suits and judgments arising out of driving in the cour[se] of their employment by limiting the plaintiff to his remedy aga[inst] the United States under 28 U.S.C. 1346(b), the Federal Tort Cla[ims] Act.

Subsection (b) of the Drivers Act, 28 U.S.C. 2679(b) is th[e] "basic provision of the bill." H. Rept. No. 297, *supra*, p. 4. In order to implement subsection (b)'s plain command that the e[x]clusive remedy in all of these cases shall be under the Tort Claims Act against the United States, the Act insures that actions such as the present one, which are instituted in State courts against government drivers individually, are to be removed to the United States district court and are to proceed as actions against the United States under the Federal Tort Claims Act. Thus subsection (d), 28 U.S.C. 2679(d), provides that whe[n] the Attorney General certifies that the defendant driver "was acting within the scope of his employment at the time of the in[c]ident out of which the suit arose", the state court action is to be removed to the appropriate United States district court and "the proceedings deemed a tort action brought against the United States" under the Federal Tort Claims Act.

Of course, after such a removal, there remains the possibl[e]

t, during pre-trial proceedings in the United States district
urt, a fuller development of the evidence might convince the
urt that the Government driver was not acting within the scope
his official employment and hence that there was no Tort
aims Act remedy, in fact, available against the United States.
Tort Claims Act expressly limits federal liability to claims
used by negligence on the part of a Government employee "while
ing within the scope of his office or employment." 28 U.S.C.
46(b). But if the employee, at the time of his alleged tort,
not so acting, the Tort Claims Act is inapplicable and the
urt would lack jurisdiction to entertain the claim against the
ted States. United States v. Eleazer, 177 F. 2d 914 (C.A. 4),
rtiorari denied, 339 U.S. 903.

The Federal Drivers Act takes into account this latter con-
ngency, i.e., that the driver may have been outside the scope
his employment at the time of the accident. Subsection (d)
ovides that if the district court should "determine on a hear-
on a motion to remand held before a trial on the merits that
case so removed is one in which a remedy by suit within the
aning of subsection (b) of this section [28 U.S.C. 2679(b)] is
available against the United States, the case shall be re-
nded to the State court."

Thus, in line with the Congressional plan and for the purpose
the remand provision in subsection (d) of the Federal Drivers
, it is clear that a Tort Claims Act remedy "is not available
ainst the United States" only where the Government driver is
termined by the Court to have been acting outside the scope of

his employment.[4/] And, as a necessary corollary, where the To Claims Act remedy is "not available" for some reason other tha lack of scope of employment, there can be no personal liabilit on the part of the driver, and the remand provision does not apply.

In the present case, therefore, the district court proper determined that the remand provision of subsection (d) did not apply, and that Ralls and Byington continued to enjoy the prot tion of the Drivers Act. For Van Houten's Complaint made it clear that Ralls and Byington were driving within the scope of their employment at the time of the accident, and the remand c viously was not sought on the ground of any alleged lack of sc employment. Rather, Van Houten sought remand because the Tort Claims Act was unavailable to him by virtue of the exclusivit provisions of the F.E.C.A., 5 U.S.C. 757(b) (R. 17-19).

In these circumstances, since the non-availability of th Tort Claims Act remedy to Van Houten stems from the exclusivi provisions of the F.E.C.A., rather than from absence of any s of employment on the part of Ralls and Byington, the latter s enjoy the protection of the Drivers Act and the remand provis

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4/ The legislative history of the Drivers Act emphasizes the fact that Congress intended its protection to extend only to drivers who were on government business. H. Rept. No. 297, su p. 4, states: "the new language [of 28 U.S.C. 2679(b)] would only apply when the employee is acting in his official capacity at the time of the accident giving rise to the claim, and doe not provide the basis for any liability against the United St based on the unauthorized use of Government motor vehicles."

inapplicable.[5] In other words, in light of the Drivers Act, ⁄n Houten has no action against Ralls and Byington as a matter law and the district court properly refused to remand the se for trial against them individually.

Any other result would have nullified the immunity against mage suits which Congress intended to confer on federal drivers th respect to all claims based on their driving while on Gov- nment business. And the district court's view is strongly re- forced by the pertinent legislative history establishing that ngress set out to provide a comprehensive shield to Government ivers, so as to wholly remove the threat of personal liability, d improve the morale of government drivers. H. Rept. No. 297, pra, pp. 3-4.[6]

/ The result here is, therefore, to limit Van Houten to his mpensation remedy under the F.E.C.A. That result is however no means unique. Larson reports that a number of state work- n's compensation statutes themselves prohibit tort suits both ainst employers and negligent fellow employees. 2 Larson, orkmen's Compensation Law § 72.20, pp. 173-174.

Furthermore, the Supreme Court has noted the clear advantages a claimant of the comprehensive system of benefit payments un- r the Act. Johansen v. United States, 343 U.S. at 440-441. mpare Feres v. United States, 340 U.S. 135, 145. In addition, point out that benefit payments under the F.E.C.A. may be quite bstantial. Under the Act, benefits up to approximately $1600 r month may be payable during an employee's disability. 5 .S.C. (Supp. II) Appendix 756(c).

/ Indeed, the bill as it emerged from the Senate Judiciary mmittee would have permitted a plaintiff a choice as to whether s action was to be removed to Federal Court for trial under the rt Claims Act. S. Rept. No. 736, 87th Cong., 1st Sess., pp. 5, 8. A similar provision led to a Presidential veto in 1960. use Misc. Documents, 86th Cong., 2d Sess., Document No. 415. n the Senate floor, the provision of the bill granting an option plaintiff was deleted, and instead a proposal by Senator Keat- ng was adopted which provided for mandatory removal of these ac- ions upon certification by the Attorney General that the Driver

Continued on next page)

In this connection, it is significant that the GSA, which drafted the Bill and repeatedly urged its passage, was primarily concerned with the high cost of liability insurance Government drivers incurred just to protect themselves from personal action. See H. Rept. No. 297, supra, p. 7. This concern was repeated by Senator Keating on the Senate floor. 107 Cong. Rec. 18499-500, 87th Cong., 1st Sess. Obviously, if the driver is not fully immune from liability for damages resulting from driving in the course of his employment, he must still bear a heavy insurance burden and must still drive at the risk of suit and personal liability -- risks Congress fully intended to eliminate.

Moreover, the decided cases attest still further to the correctness of the district court's decision. Thus, two other district courts have recently held that the Drivers Act fully immunizes government drivers from liability arising from driving on government business, even where as here the injured plaintiff has no action against the United States under the Tort Claims Act by virtue of the exclusivity provisions of the Federal Employees' Compensation Act. Vantrease v. United States, (W.D. Mich., No. 5469, decided August 29, 1967) pending on appeal;[7] Beechwood v. United States, 264 F. Supp. 926 (D. Mont.). See Noga v. United

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6/ (Continued from previous page)
was in the scope of his employment. 107 Cong. Rec. 18499-500. In the words of Senator Keating, the bill as adopted "makes certain that suits will not be removed improperly, but protects the employee from any personal liability where it is conceded that he was acting within the scope of his employment." Id. at 18500.

7/ For the convenience of the Court we have reproduced a copy of the Vantrease decision in the appendix to this brief, infra, pp. 1a-11a.

ates, 272 F. Supp. 51 (N.D. Calif.), pending on appeal to this urt, No. 22,165.[8/] Similarly, in Hoch v. Carter, 242 F. Supp. 3 (S.D.N.Y.); Reynaud v. United States, 259 F. Supp. 945 (W.D. .); and Fancher v. Baker, 240 Ark. 288, 399 S.W. 2d 280, the urts held the government driver immune from liability in situaons where the Tort Claims Act remedy was unavailable to plainff because of the expiration of the limitations period.

Appellant's reliance upon Weyerhaeuser S. S. Co. v. United ates, 372 U.S. 597, for the proposition that the Drivers Act ould not apply here, is entirely misplaced. In Weyerhaeuser e Court found no evidence that Section 7(b) of the F.E.C.A. s intended to modify the historic rule of divided damages apicable in maritime collision cases, and therefore upheld the vision of damages between the United States and a private shipner. In the present case, however, we are dealing with the deral Driver's Act, and both the language and legislative hisry of that Act show conclusively that the very purpose of Conress was to abrogate the tort recovery formerly available

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/ But see also Gilliam v. United States, 264 F. Supp. 7, (E.D. .), pending on appeal, where the district court in nearly idencal circumstances to this case implicitly accepted the government's position that the Driver's Act fully protected the driver, t entered judgment against the United States under the Tort aims Act. We think that the district court in Gilliam should ve dismissed the action outright, and we have taken an appeal the United States Court of Appeals for the Sixth Circuit.

against government drivers. Moreover, as this Court has, in e-
fect, twice held, the principle of the Weyerhaeuser decision i
limited to maritime collision cases, or perhaps to cases where
the United States undertakes an independent contractual obliga
tion to some third party. United Air Lines, Inc. v. Wiener, 3
F. 2d 379, 402-404, certiorari dismissed, sub nom., United Air
Lines v. United States, 379 U.S. 951; Wien Alaska Air Lines v.
United States, 375 F. 2d 736 (C.A. 9), certiorari denied, 389
U.S. 941. Accord: Maddux v. Cox, 382 F. 2d 119 (C.A. 8).
Weyerhaeuser, therefore, plainly has no application here. 9/

To sum up, therefore, we submit that the language, purpos
and legislative history of the Drivers Act and the pertinent d
cisions support the district court's conclusion that Van Houte
has no cause of action against Ralls and Byington.

9/ Appellant's reliance upon Allman v. Hanley, 302 F. 2d 559
(C.A. 5) and Marion v. United States, 214 F. Supp. 320 (D. Md.
is also misplaced, for those cases merely hold that the F.E.C.
does not prohibit a suit by one federal employee against anoth
but neither case deals with the Federal Drivers Act, which, un
like the F.E.C.A., does prohibit a suit against a co-employee
for negligent driving in the course of his government employme

Moreover, appellant's contention (Br. 7-8) with respect t
the letters from the Department of Labor (R. 64-68) must be re
jected, for those letters reflect nothing more than a suggesti
that Van Houten "may" have a tort suit, and do not reflect the
Department of Labor's full knowledge of the facts or its commi
ment that a tort remedy was in fact available. The letters
appear, rather, to be in the nature of form letters.

CONCLUSION

For the foregoing reasons, the judgment of the district urt dismissing appellant's complaint should be affirmed.

Respectfully submitted,

EDWIN L. WEISL, Jr.
Assistant Attorney General,

JOSEPH L. WARD
United States Attorney,

MORTON HOLLANDER,
WILLIAM KANTER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

GUST 1968

CERTIFICATE

I certify that, in connection with the preparation of this ief, I have examined Rules 18, 19 and 39 of the United States urt of Appeals for the Ninth Circuit, and that, in my opinion, e foregoing brief is in full compliance with those rules.

William Kanter

WILLIAM KANTER
Attorney,
Department of Justice,
Washington, D.C. 20530.

AFFIDAVIT OF SERVICE

STRICT OF COLUMBIA)
) ss.
TY OF WASHINGTON)

WILLIAM KANTER, being first duly sworn, deposes and says:

That on August 9 , 1968, he caused three copies of the regoing brief for the appellees to be served by air mail,

stage prepaid, upon counsel for appellant:

George W. Abbott, Esquire
First National Bank Building
Minden, Nevada 89423

William Kanter
WILLIAM KANTER
Attorney,
Department of Justice,
Washington, D.C. 20530.

oscribed and sworn to before me
is 9th day of August 1968.

[SEAL]

NOTARY PUBLIC

Commission expires April 14, 1972.

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

SAMMY J. VANTREASE, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 5469

Before HON. W. WALLACE KENT, Chief Judge.

Kalamazoo, Michigan, August 29, 1967.

OPINION OF THE COURT

ANTOINETTE DUDA
Official Court Reporter
418 Federal Building
Grand Rapids, Michigan

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

SAMMY J. VANTREASE, Plaintiff,	)	Civil Action
vs.	)	No. 5469
UNITED STATES OF AMERICA, Defendant.	)	

Before HON. W. WALLACE KENT, Chief Judge.

Kalamazoo, Michigan, August 29, 1967.

APPEARANCES:

MARCUS, McCROSKEY, LIBNER,
REAMON, WILLIAMS & DILLEY,
Grand Rapids, Michigan,
By MR. J. WALTER BROCK,

on behalf of the Plaintiff;

MR. JAMES W. EARDLEY,
Assistant United States Attorney,

on behalf of the Defendant.

THE COURT: This is the government's motion for a summary judgment, on the ground that the suit by the plaintiff is barred by the provisions of Title 28, U.S.C.A., Section 2679(b).

The case could be disposed of summarily by pointing out that in the file there appear the following: A complaint filed in the Circuit Court for Calhoun County; the usual papers filed on removal; a motion for substitution, which has been previously decided; an answer filed by the United States, which was substituted for the defendant Dorr Cameron; and a motion for judgment on the pleadings and a motion for summary judgment. There is no motion for remand, although the point was made during the course of the arguments on the motion for substitution of defendants.

Briefly, the cause of action arises out of an occurrence on December 8, 1964, when the plaintiff was injured while working as a Post Office employee when struck by an automobile driven by Dorr Cameron, a Post Office employee driving in the scope of his employment.

The case was removed, and the government substituted, under the provisions of Section 2679(d) of Title 28.

The government's motion is based on the

theory that Section 2679(b) of the statute makes the remedy against the United States the exclusive remedy; that there are no rights against anyone else; that the plaintiff has been paid compensation under the Federal Employees' Compensation Act, 5 U.S.C.A., Section 757, which in Section 757(b) provides that government employees eligible for compensation may not sue their employer, the United States.

This case has been before other courts. In Beechwood v. United States, 264 F.Supp. 926, a decision of the District Court in Montana, on almost exactly the same facts, the court said:

> "The plaintiff's remedy against the United States is limited to recovery under the Federal Employees' Compensation Act and the United States' motion for summary judgment should therefore be granted. The case is dismissed and not remanded because plaintiff has no remedy against Selma Heathrel." Citing the statute. And paraphrasing: The act "insulates a federal employee from liability for injuries to another arising out of motor vehicle accidents happening in the course of federal employment."

The government has called to the Court's

attention a decision in the Northern District of California in 1967, not yet reported: Noga v. United States. A copy of the opinion is attached to the government's brief. And quoting from the opinion:

> Plaintiff "argues as follows: * * * To preclude plaintiff from a remedy after the passage of the Federal Drivers Act would be to impute to Congressional action an intent, admittedly absent, to cut off completely the remedy he previously had because he is fortuitously injured in a motor vehicle accident.
>
> "The Court does not agree with plaintiff's argument. What Congress would or would not have done if it had considered a particular problem is a profitless line of inquiry when general statutes can be found which set forth the law clearly. Section 2679(b) of 28 U.S.C. provides that the exclusive remedy of a person injured by the government employee driver of a motor vehicle is against the United States. This statute eliminates plaintiff's remedy against the driver, individually, which he had before 1961."
>
> Citing the Workmen's Comp. Act: "...provides that the exclusive remedy against the United States for an employee for injuries sustained in the course of his

employment is under the Federal Employee's Compensation Act. This statute precludes an employee from suing the United States under the Federal Tort Claims Act for injuries sustained while in the scope of his employment. Together these two statutes provide that plaintiff in the instant case has no cause of action against the United States other than under the Federal Employees' Compensation Act."

And it should be pointed out that the plaintiff in this case does not claim any cause of action against the Government of the United States. The plaintiff concedes that he has no cause of action against the United States, but claims that he should be permitted to pursue his common law remedies against Dorr Cameron, who was the defendant in the state court action, and calls attention to the opinion of Judge Mac Swinford, of the Eastern District of Kentucky, in Gilliam v. United States, 264 F. Supp. 7.

Judge Swinford reached the conclusion, in the reported case as well as in an earlier unreported decision, that if Congress had intended to abolish the right to sue, it would have expressly indicated so, meaning the right to sue the individual doing the injury.

We must respectfully disagree with Judge Swinford.

In the legislative history relating to this statute, and from the language of the statute, itself, it appears obvious that the intent of The Congress was to insulate government employees from suit where they might otherwise be liable in a common law action for negligence if such negligence was in the course of driving an automobile in the scope of their employment by the United States.

The government has not passed any other statute which has been called to this Court's attention which would insulate a government employee from suit for his negligent acts. The government has very definitely excluded suits by any person under the provisions of Section 2679(b) of Title 28, under the circumstances set forth in that section.

The sole cause of action where a driver driving in the scope of his employment as a government employee injures another person is by suit against the United States. As conceded by the plaintiff here, he cannot maintain a suit against the United States.

This Court is satisfied that, as pointed out by the California decision, indulging in speculation as to what The Congress would or would not have done if it had considered a specific problem which is now before the Court

is a profitless line of inquiry. Congressional attitudes are not that predictable.

The purpose of The Congress was very clear, and is still clear. The purpose of The Congress in enacting the statute as it did in 1961 was to prevent suits against drivers of government vehicles, or vehicles operated for the government, when the employee was operating within the cour of his employment.

In Judge Mac Swinford's opinion, he cites with approval and, in fact, may rely upon Marion v. United States, 214 F.Supp. 320.

As pointed out by counsel in this case, the Marion case has been cited as authority for a contrary resu than that reached in California and Montana, in the Noga ca in California and the Beechwood case in Montana.

However, an examination of the Marion case makes it obvious that the point which is now before the Court was not before the Court in the District Court for Maryland in the Marion case.

In that case, the accident in question occurred on August 27, 1959. On August 25, 1961, plaintiff instituted a suit under the Federal Tort Claims Act. The injured person was a Federal employee; the driver of the

ehicle inflicting the injury was driving a privately-owned ehicle, but driving in the course of his employment as a overnment employee. The Court granted summary judgment as o the United States, and let the suit stand as to the co-mployee defendant.

In reality, the Marion case is of no authority or consequence in the consideration of the rights of the parties here, since it appears that Section 2679(b), making the suit against the government the exclusive remedy, was embodied in Public Law 87-258 of the Public Laws enacted in 1961, and it was provided, in Section 2 of the act, without reading in detail:

> "The amendments made by this act," which includes Section (b), "shall be deemed to be in effect six months after September 21, 1961, but any rights or liabilities then existing shall not be affected."

In the Marion case, the claim came into existence in 1959; suit was instituted before the effective date of the statute. So while the motion was decided after the effective date, it doesn't make any difference.

So the government's motion for summary judgment is granted for the reasons herein stated.

And you may present an appropriate order,

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Mr. Eardley.

MR. EARDLEY: Thank you, Your Honor.

THE COURT: All right.

MR. BROCK: One further thing, Your Honor.

If we submit a motion to remand, could we submit that along with the order denying the motion to remand all at the same time, and not have further oral arguments and briefs?

THE COURT: Certainly. I don't know any reason why not.

MR. BROCK: That would just keep the record straight.

THE COURT: Yes. That is not the reason for the Court's decision, although it might be a meritorious reason. That is not the reason for it. I would rather decide it on what I consider to be the merits of the controversy rather than the technical question.

MR. BROCK: I understand that, Your Honor.

THE COURT: So you are at perfect liberty to include in the file, before the order is prepared, a motion to remand, and include in the order, or Mr. Eardley can include in the order, a denial of the motion to remand.

MR. BROCK: Fine. Thank you, Your Honor.

THE COURT: All right. We will recess.

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IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

I, Antoinette Duda, Official Court Reporter, do hereby certify that the foregoing is a full, true and correct transcript of the opinion of the court in this matter, according to my original stenographic notes.

Official Court Reporter
United States District Court
Western District of Michigan